SUPREME COURT, U. S.

FILED
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E. ROBERT SEAVER, CLERK

Supreme Court of the United States

October Term, 1971

No. ..... 71 - 471

COURTLAND C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

Petitioner,

v.

JOSEPH LEVINE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ANDREW P. MILLER
Attorney General of Virginia

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Richmond, Virginia 23219

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PRELIMINARY STATEMENT

Courtland C. Peyton, Superintendent of the Virginia State Penitentiary, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit entered on July 2, 1971, in the case of Joseph Levine v. Courtland C. Peyton, Superintendent of the Virginia State Penitentiary. The mandate was stayed upon application of the Superintendent on July 19, 1971.

OPINIONS BELOW

The first memorandum decision of the United States Court of Appeals of September 16, 1968, is not reported,

but is included herein as Appendix A (App. p. 1). The memorandum order of the United States District Court for the Eastern District of Virginia, Norfolk Division, dated October 30, 1968, is unreported, but is included herein as Appendix B (App. p. 3). The final order of the United States District Court for the Eastern District of Virginia, Norfolk Division, dated November 21, 1968, is also unreported, but is included herein as Appendix C (App. p. 7).

The opinion of the court below is reported at 444 F.2d 525, and is also included herein as Appendix D (App. p. 9).

JURISDICTION

The jurisdiction of this Court to issue the writ of certiorari in this case is grounded upon 28 U.S.C., Section 1254(1).

STATUTES INVOLVED

§ 19.1-249. *Accused guilty of part of offense charged, sentenced; on new trial what tried.*—If a person indicted of a felony be by the jury acquitted of part of the offense charged, he shall be sentenced for such part as he is so convicted of, if the same be substantially charged in the indictment, whether it be felony or misdemeanor. If the verdict be set aside and a new trial granted the accused, he shall not be tried for any higher offense than that of which he was convicted on the last trial. (Virginia Code)

§ 19.1-291. *Ascertainment of punishment in criminal cases generally when tried by jury.*—The punishment in all criminal cases tried by a jury shall be ascertained by the jury trying the same within the limits prescribed by law. (Virginia Code)

§ 19.1-292. *Ascertainment of punishment in felony cases.*—The term of confinement in the penitentiary or in

jail of a person convicted of felony, if that punishment is prescribed, and the amount of the fine, if the felony be also punishable by fine, shall be ascertained by the jury, if there be one, or by the court trying the case without a jury, so far as the term of confinement and the amount of the fine are not fixed by law. (Virginia Code)

§ 53-272. *Suspending sentence and placing on probation.* —After a plea, a verdict or a judgment of guilty in any court having jurisdiction to hear and determine the offense, with which the prisoner at the bar is charged, if there are circumstances in mitigation of the offense, or if it appears compatible with the public interest, the court may suspend the execution of sentence, in whole or in part, or the imposition of sentence or commitment, and may also place the defendant on probation under the supervision of a probation officer, during good behavior for such time and under such conditions of probation as the court shall determine. In case the prisoner has been sentenced for a misdemeanor and committed, or in case a jail sentence has been imposed upon the prisoner upon conviction of a felony, the court, or judge of such court in vacation may at any time before the sentence has been completely served, suspend the unserved portion of any such sentence.

In case the prisoner has been sentenced but not actually committed and delivered to the penitentiary for a felony the court which heard the case, if it appears compatible with the public interest and there are circumstances in mitigation of the offense, may place the defendant on probation under the supervision of the probation officer during good behavior, for such time and under such conditions of probation as the court shall determine.

In any case wherein a court is authorized to suspend the imposition or execution of sentence, such court may fix

the period of suspension for a reasonable time, having due regard to the gravity of the offense, without regard to the maximum period for which the prisoner might have been sentenced.

In case the prisoner has been sentenced and committed to the penitentiary for a felony and the sentence is partially suspended, for purposes of good behavior credit and for parole eligibility, the term of imprisonment shall be that portion of the sentence which was not suspended. (Virginia Code)

QUESTION PRESENTED

Did The United States Court Of Appeals For The Fourth Circuit Err In Holding That The Imposition Of An Increased Sentence Upon Conviction Of A State Prisoner In A Retrial Is Unconstitutional Even Where The Prisoner Is Tried And Sentenced By A Jury?

STATEMENT OF THE CASE

On June 7, 1963, a warrant was issued charging the appellee with statutory burglary, said crime having been committed on that date. At the July, 1963 Term of the Grand Jury for the Circuit Court of Nansemond County, Virginia, an indictment was returned charging Levine with statutory burglary. On July 8, 1963, Joseph H. Fulcher, an attorney, was appointed by that Court to represent him. On July 26, 1963, because of Mr. Fulcher's illness, another attorney, Frank R. Watkins, was appointed to represent appellee. On July 31, 1963, Levine, represented by Mr. Watkins, entered a plea of not guilty, was tried by jury, found guilty and his punishment fixed at ten years in the Virginia State Penitentiary. He was sentenced in conformity with the jury's verdict in accordance with the applicable provisions of Virgina's law. Levine thereafter

filed a petition for a writ of habeas corpus which was heard in the Circuit Court of Nansemond County and, on August 31, 1964, said petition was dismissed. On October 7, 1965, a petition for a writ of error to that judgment was denied by the Supreme Court of Virginia.

Thereafter, Levine sought relief in the United States District Court for the Eastern District of Virginia and counsel was appointed to represent him. A plenary hearing was held and, on June 22, 1966, an order was entered in that court vacating the Nansemond County conviction on the ground that the appellee had been denied the right to appeal his conviction.

Levine was retried by a jury and, on September 13, 1966, in accordance with the jury's verdict, he was sentenced to serve a term of fifteen years in the penitentiary. A petition for a writ of error was denied by the Supreme Court of Virginia on June 14, 1967.

Petitioner filed another petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, Norfolk Division on July 19, 1967. That petition was dismissed on July 26, 1967, on the ground that the appellee had failed to exhaust his available state court remedies.

Thereafter, by a Memorandum Decision, the United States Court of Appeals for the Fourth Circuit reversed the District Court on September 16, 1968 (Appendix A). The appellant then filed an answer in the District Court and, on November 21, 1968, the District Court Judge directed that Levine either be released or resentenced to a term not exceeding ten years in conformity with the Court of Appeals' Memorandum Decision (Appendix C). The Fourth Circuit Court of Appeals, on July 2, 1971, affirmed the District Court's determination (Appendix D).

ARGUMENT

The Court Of Appeals Erred In Holding That The Appellee Must Be Released Or Resentenced Because He Received A Greater Sentence On His Retrial In The Circuit Court Of Nansemond County Even Though The Greater Sentence Was Imposed By A Jury.

The United States Court of Appeals for the Fourth Circuit has held in the *per curiam* opinion below that its prior opinions in *Patton* v. *North Carolina,* 381 F.2d 636 (4th Cir. 1967), *cert. denied* 390 U.S. 905 (1968), *May* v. *Peyton,* 398 F.2d 476 (4th Cir. 1968), *cert. denied,* 402 U.S. 948 (1971), and *McLaren* v. *Peyton,* No. 12,450 (4th Cir. 1968) (*mem. dec.*), *cert. denied,* 401 U.S. 1012 (1971), controlled the disposition of the instant case, although recognizing that this Honorable Court's decision in *North Carolina* v. *Pearce,* 395 U.S. 711 (1969) was somewhat more limited in scope than its decisions in *Patton, May* and *McLaren.* The Court further concluded that "jury sentencing does not free a defendant of the apprehension of a harsher sentence. We therefore hold that *Pearce* applies to a jury sentencing."

The essential question before this Court is whether the Court of Appeals' conclusion is correct as to the applicability of *Pearce* to jury sentencing. First, it should be pointed out that in Virginia sentencing is performed by the jury when the trial is held before a jury (Note, *Jury Sentencing in Virginia,* 53 Va.L.Rev. 968 (1967)). There is no separate procedure or portion of the trial for sentencing in Virginia and the practice in Virgina is similar to those unsuccessfully attacked in *McGautha* v. *California,* 402 U.S. 183 (1971) and *Crampton* v. *Ohio,* 402 U.S. 183 (1971), both death penalty cases. This Court has held that such a single —verdict trial does not violate the Constitution.

In *North Carolina* v. *Pearce, supra,* this Court held, *inter alia,* "that neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction" (395 U.S. at 723). But this Court then considered the impact of the Due Process Clause of the Fourteenth Amendment on this vital question and said:

> "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." (395 U.S. at 725)

At no point has the appellee Levine contended that his increased sentence imposed at the hands of a jury was the product of a retaliatory motivation on the part of that jury. Nor is there any evidence that the jury or any member thereof even had any knowledge of Levine's prior trial, the decision of the Court setting aside that conviction or the nature or extent of any prior sentence. *Thus, the danger that obviously persuaded this Court to lay down the guidelines it deemed necessary in Pearce, does not exist in the instant case or in any case where the sentencing is performed by a jury.*

The Court below has mechanistically applied the sort of *per se* rule in retrial sentencing that this Court rejected in *Pearce.* This Honorable Court should grant a Writ of Certiorari to clear up some of the confusion surrounding the applicability of *Pearce* to other factual circumstances. In both *Moon* v. *Maryland,* 398 U.S. 319 (1970) and *Odom*

v. *United States,* 400 U.S. 23 (1970), your honors dismissed as improvidently granted Writs of Certiorari in cases the reasons for the greater severity of the sentences were brought to the Court's attention even though not a part of the record. In *North Carolina* v. *Rice,* #1325 (Writ granted April 5, 1971), the Court granted a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit in a case where that Court applied *Pearce* to an appeal *de novo* from a court not of record to a court of record. In addition, the Seventh Circuit Court of Appeals in *United States ex rel. Starmer* v. *Russell,* 378 F.2d 808 (7th Cir. 1967), the Third Circuit Court of Appeals in *United States* v. *White,* 382 F.2d 445 (3rd Cir. 1967), *cert. denied* 389 U.S. 1052 (1968) and *Virgin Islands* v. *Bell,* 423 F.2d 692 (3rd Cir. 1970), *cert. denied* 398 U.S. 937 (1970) and the Tenth Circuit Court of Appeals in *United States* v. *Kienlen,* 415 F.2d 557 (10th Cir. 1969) have decided similar cases contrary to holdings of the Fourth Circuit Court of Appeals (see also *Marano* v. *United States,* 374 F.2d 583 (1st Cir. 1967)). At least two district courts have ruled contrary to the holding below in cases where the greater sentence on retrial was imposed by a jury (*Britt* v. *Tallett,* 315 F.Supp. 401 (E.D. Tenn. 1970) and *Hammer* v. *Cox,* Misc. #7164-N and 7165-N (E.D. Va., February 15, 1971)). In addition, this Honorable Court has previously decided this issue adversely to the decision of the court below in *Robinson* v. *United States,* 324 U.S. 282 (1945), rehearing den. 324 U.S. 889 (1945), second rehearing den. 325 U.S. 895 (1945) and in *Robinson* v. *United States,* 264 F.Supp. 146 (W.D. Ky. 1967), aff'd 394 F.2d 823 (6th Cir. 1968), *cert. den,* 393 U.S. 1057 (1969), rehearing den. 393 U.S. 1124 (1969), second rehearing den. 396 U.S. 872 (1969), a case in which a

prisoner received a life sentence in the first trial and the death sentence on retrial.

The decision below patently ignores the clear language of this Court in *Pearce* and it totally denies the logic behind that decision. It further amounts to a judicial amendment of Virginia law by requiring that at the time of the retrial, the instructions given the jury as to the amount of punishment to be imposed must contain language limiting the sentence to that previously imposed. In any event, under Virginia's single-verdict jury procedure it would undoubtedly be constitutionally impermissible to introduce evidence of misconduct subsequent to the first trial before the jury to permit a greater sentence under *Pearce*. Thus, the clear effect of the decision of the court below is to prohibit Virginia juries from ever imposing a greater sentence in a retrial. This judicial amendment of provisions of law held constitutional by this Court in *McGautha* and *Crampton* is both unwarranted and illogical.

CONCLUSION

For the reasons stated, it is respectfully submitted that the writ of certiorari should be granted, and the judgment in this case reversed.

Respectfully submitted,

ANDREW P. MILLER
Attorney General of Virginia

RENO S. HARP, III
Deputy Attorney General of Virginia

ROBERT E. SHEPHERD, JR.
Assistant Attorney General of Virginia

Supreme Court Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Reno S. Harp, III, a Deputy Attorney General of Virginia, counsel for the Superintendent in the captioned matter, and a member of the bar of the Supreme Court of the United States, do hereby certify that on this 1st day of October, 1971, I mailed a copy of the foregoing Petition for a Writ of Certiorari to the Judgment of the United States Court of Appeals for the Fourth Circuit by first class mail to George G. Grattan, IV, Esquire, Attorney at Law, 1200 Mutual Building, Richmond, Virginia 23219, counsel for the appellee herein.

RENO S. HARP, III
Deputy Attorney General

APPENDIX A

Memorandum Decision

Joseph Levine seeks to appeal from an order of the district court (Hoffman, J.) dismissing his petition for habeas corpus for failure to exhaust his state remedies in that, as shown on the face of the petition, he had failed to institute state habeas corpus proceedings.[1]

Levine states in his petition that he has presented, argued, and obtained a determination on every point he seeks to raise in this proceeding, in the Virginia Supreme Court of Appeals on an unsuccessful appeal of his conviction. It has been repeatedly held that a state prisoner need not resort to further and repetitive state remedies once he has presented the issues he seeks to raise in federal court to the highest court in the state and received a determination thereof. *Grundler* v. *North Carolina*, 283 F.2d 798 (4 Cir. 1960); *Edmondson* v. *Warden*, 335 F.2d 608 (4 Cir. 1964); *Massey* v. *Peyton*, No. 11,280, mem. dec. (4 Cir., June 7, 1967). Thus, it is not shown on the face of Levine's petition that state remedies have *not* been exhausted.

The district court, therefore, improperly dismissed the petition for failure to exhaust state remedies without first determining the correctness of petitioner's allegation that each point was raised in his direct appeal of his conviction. If, as Levine alleges, these issues were presented to the Virginia Supreme Court of Appeals, the allegations of deprivation of constitutional rights should be determined on the

[1] Following receipt of the district court's order dismissing his petition, Levine moved the court to rescind the order. The motion was denied, and the court below treated the notice of appeal as directed both to the order denying relief and to the order denying the motion to rescind.

merits, with a hearing if necessary, without requiring further proceedings in the Virginia courts by way of habeas corpus.

Accordingly, a certificate of probable cause is granted, the judgment of the district court is reversed, and the case is remanded for a determination on the merits unless it appears that the petitioner's allegations as to exhaustion of state remedies are not correct. Should the district court find that, as alleged by Levine, he was sentenced to a longer term of imprisonment at his second trial in the state court than he had received at his original trial, his release may be ordered subject to the Commonwealth's right to resentence him to a term not exceeding ten years from the date of his original sentence.[2]

/s/ Herbert S. Boreman
United States Circuit Judge

/s/ Albert V. Bryan
United States Circuit Judge

/s/ Harrison L. Winter
United States Circuit Judge

FILED
Sep. 16, 1968
Samuel W. Phillips
Clerk

A True Copy, Teste:
Samuel W. Phillips, Clerk
By /s/ Irene P. Rudonko
Deputy Clerk

[2] We note that Levine's petition states bare legal conclusions without facts to support them. For this reason the district court may initially afford Levine the reasonable opportunity to amend his petition.

APPENDIX B

Memorandum Order

The Court has now examined the answer of the respondent with the attachments thereto, same having been filed on October 17, 1968.

As to the contention that the law and evidence does not support the conviction of the petitioner at his trial conducted in the Circuit Court of Nansemond County, Virginia, on September 13, 1966, from a review of the petition for writ of error filed by the petitioner in the Supreme Court of Appeals of Virginia on January 12, 1967, it clearly appears that there was ample evidence to support the conviction. No plenary hearing is required to arrive at this conclusion.

As to the contention advanced by the petitioner that his conviction was based upon perjured evidence, the petitioner has not exhausted his state court remedies. In reviewing the petition for writ of error, the Court assumes that the petitioner's contention on this point is occasioned by the fact stated in the petition for writ of error that petitioner took a lie detector test on two occasions, at the request of the police authorities, and the results of said lie detector tests would appear to indicate that the petitioner was telling the truth. According to the petition for writ of error, the trial court instructed the jury to disregard any evidence with respect to the results of the lie detector tests. This raises solely a legal issue, assuming that the results of the lie detector tests were favorable to the petitioner, and the Court would be willing to grant a plenary hearing confined to this issue alone, if the same is desired by the petitioner.

The record reveals that the petitioner, following the granting of a new trial directed by this Court in a prior

habeas corpus proceeding, received a sentence of 15 years imposed by the jury, whereas at the time of his initial trial he was only given a sentence of 10 years which sentence was declared void by this Court in a habeas corpus proceeding. The respondent states that the Commonwealth of Virginia "intends to allow the second sentence to stand." It is true that there are conflicting decisions from other courts relative to the right to impose a greater sentence in a second trial following a petitioner's successful habeas corpus proceeding. The United States Court of Appeals for the Fourth Circuit in *Patton* v. *North Carolina,* 381 F.(2d) 636 (4 Cir., 1967), and in *May* v. *Peyton,* No. 11,428 (4 Cir., 1968), has definitely held that no greater sentence can be imposed upon a petitioner at a second trial following the voiding of the first sentence. This Court recognizes that there is authority to the contrary. *United States* v. *White,* 382 F.(2d) 445 (7 Cir., 1967), cert. den. 389 U.S. 1052, and *Robinson* v. *United States,* 144 F.(2d) 392 (6 Cir., 1944), affirmed 324 U.S. 282 (1945), rehearing denied 324 U.S. 889 (1945), second petition for rehearing denied 325 U.S. 895 (1945). In *Robinson,* a plea of guilty was entered and life imprisonment imposed. Eight years later the sentence was vacated as Robinson had been denied counsel. His next trial resulted in a death sentence which was affirmed by the Supreme Court.

Whatever may be the authority pronounced in other circuits and irrespective of the views of the undersigned as to the decisions of the United States Court of Appeals for the Fourth Circuit in *Patton* and *May,* it is the duty of this Court to follow the law as interpreted by the United States Court of Appeals for the Fourth Circuit. No application for a writ of certiorari was sought in *Patton.* The mere fact that a petition for a writ of certiorari has been filed in *May*

affords no reason why this Court should not follow the memorandum of the United States Court of Appeals for the Fourth Circuit. In the memorandum decision of Circuit Judges Boreman, Bryan and Winter, filed in the petitioner's case on September 16, 1968, it is stated in part:

> "Should the district court find that, as alleged by Levine, he was sentenced to a longer term of imprisonment at his second trial in the state court than he had received at his original trial, his release may be ordered subject to the Commonwealth's right to resentence him to a term not exceeding 10 years from the date of his original sentence."

From the foregoing, it is apparent that unless the petitioner is desirous of a plenary hearing upon the issue raised with respect to the use of a lie detector, and the results of said lie detector test, there remains nothing for this Court to do except to order the petitioner's release, subject to the Commonwealth's right to resentence him to a term not exceeding 10 years from the date of his original sentence.

It is ORDERED that the petitioner do advise, within 20 days from this date whether he is desirous of a hearing on the issue raised with respect to the allegedly favorable results of the lie detector tests. If nothing is heard from the petitioner within 20 days from this date, the Court will then enter an order directing that he be released, subject to the right of the Commonwealth of Virginia to resentence him to a term not exceeding 10 years from the date of his original sentence.

The Clerk will forward certified copies of this order to the petitioner and Gerald L. Baliles, Esquire, Assistant Attorney General of Virginia

(SGD) Walter E. Hoffman
United States District Judge

At Norfolk, Virginia
October 30, 1968

A True Copy, Teste:
W. Farley Powers, Jr., Clerk
By /s/ Dorothy X. Johnson
Deputy Clerk

APPENDIX C

Final Order

In accordance with an order heretofore entered on October 30, 1968, it appearing to the Court that the petitioner does not desire a hearing on the issue raised with respect to the allegedly favorable results of lie detector tests, and it further appearing to the Court that the peitioner is otherwise entitled to relief in that he must, in line with prior decisions of the United States Court of Appeals for the Fourth Circuit, either be released or resentenced to a term not exceeding ten (10) years to commence from the time he was taken into custody for the crime of statutory burglary committed on or about June 7, 1963, it is

ORDERED that the said Joseph Levine be, and he hereby is, released from custody by the respondent herein subject to the stay of execution of this order as hereinafter provided.

The execution of this order is stayed for a period of thirty (30) days to permit the Circuit Court of the County of Nansemond to resentence the said Joseph Levine to a period of ten (10) years imprisonment to commence from the date the said Joseph Levine was taken into continuous custody for the aforesaid crime. If the said Joseph Levine is resentenced, in accordance with this order, the petition for writ of habeas corpus shall stand dismissed.

The Court is aware of the fact that the United States Supreme Court has granted a writ of certiorari in No. 418, *Simpson* v. *Rice,* where the same issue is presented. In the event the respondent desires to appeal from the final order entered herein, a certificate of probable cause will issue and the matter of any further stay of execution of the terms of this order will be the subject of action by the United States Court of Appeals for the Fourth Circuit, or one of the judges of said court.

The Clerk will forward certified copies of this order to the petitioner and Gerald L. Baliles, Esquire, Assistant Attorney General of Virginia.

(SGD) Walter E. Hoffman
United States District Judge

At Norfolk, Virginia
November 21, 1968

A True Copy, Teste:
W. Farley Powers, Jr., Clerk
By /s/ Dorothy X. Johnson
Deputy Clerk

APPENDIX D

Per Curiam:

The Commonwealth of Virginia appeals from an order of the district court granting habeas corpus relief to Joseph Levine. We affirm.

After our opinions in *Patton* v. *North Carolina,* 381 F.2d 636 (4th Cir. 1967), and *May* v. *Peyton,* 398 F.2d 476 (4th Cir. 1968), the district court found that Levine's constitutional right had been violated by the imposition of a harsher sentence by a jury after his retrial. The district court granted the writ conditioned on the Commonwealth's failure to resentence Levine to a sentence not in excess of ten years imprisonment, the sentence he received at his first trial. The Commonwealth appealed.

When his ten years sentence had expired, allowing for good conduct time, Levine applied for bail pending disposition of his appeal. The Commonwealth did not oppose the motion, and we granted release on his own recognizance. We stayed action on the appeal pending disposition by the Supreme Court of *North Carolina* v. *Pearce,* 395 U.S. 711 (1969), then *May* v. *Peyton,* 398 F.2d 476 (4th Cir. 1968), *cert. denied,* ..... U.S. ....., 39 U.S.L.W. 3486 (1971), and *McLaren* v. *Peyton,* No. 12.450 (4th Cir. 1968) (*mem. decis.*), *cert. denied,* ..... U.S. ....., 39 U.S.L.W. 3437 (1971).

We reaffirm the results of *May* and *McLaren.* Although we recognize *Pearce* is somewhat more limited in scope than *Patton,* we think that the Supreme Court was concerned, as we are, that a defendant be freed of the apprehension of a harsher sentence after retrial. Due process requires no less. See *Pearce, supra,* at 725. Jury sentencing[1]

[1] Ann. Code of Virginia, §§ 19.1-291, 292 (1960 Repl. Vol.). For an excellent discussion of jury sentencing in Virginia, see Note, Jury Sentencing in Virginia, 53 U. Va. L. Rev. 968 (1967).

does not free a defendant of the apprehension of a harsher sentence. We therefore hold that *Pearce* applies to a jury sentencing.

Since we have found *Pearce* to be retroactive in effect to those who actually received harsher sentences on retrial, *James* v. *Copinger,* 428 F.2d 235 (1970), *modified on resubmission,* ..... F.2d ..... (4th Cir. April 20, 1971), we affirm.

Affirmed.